

ORIGINAL

FILED
 JUL 26 2012
 RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

E-filing

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 T. CHRISTOPHER JOHNS; and
 JOHNS & ALLYN, A.P.C.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

MICHAEL DeMARTINI; and RENATE
 DeMARTINI,

Plaintiffs,

vs.

THOMAS CHRISTOPHER JOHNS; JOHNS
 & ALLYN, A.P.C.; and DOES 1 TO 30,
 inclusive,

Defendants.

Case No.: **Cv 12 3929**

**NOTICE OF REMOVAL OF CIVIL
 ACTION UNDER 28 U.S.C. §1441
 PURSUANT TO 28 U.S.C. § 1332**

State Action Filed: June 27, 2012

JCS

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that defendants THOMAS CHRISTOPHER JOHNS and
 JOHNS & ALLYN, A.P.C. (collectively "Defendants") hereby remove this action to the United
 States District Court for the Northern District of California, pursuant to 28 U.S.C. §§ 1332, 1441,
 on the grounds that there is complete diversity of citizenship between plaintiffs MICHAEL
 DeMARTINI and RENATE DeMARTINI ("Plaintiffs"), citizens of the State of Nevada, and
 Defendants, which are citizens of California; and the amount in controversy exceeds the
 jurisdictional minimum of \$75,000.00, exclusive of interests or costs, as set forth in section
 1332(a).

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FAXED

1 The foregoing facts were true at the time that the complaint in this matter was filed and
2 remain true as of the date of the filing of this notice of removal, as more fully set forth below.

3 1. On or about June 27, 2012, Plaintiffs commenced this action against Defendants
4 and Does 1 through 30 by filing a complaint in the Superior Court of California, in and for the
5 County of Marin, entitled *Michael DeMartini, et al. v. Thomas Christopher Johns, et al. and Does*
6 *1 through 30*, bearing Case No. CIV 1202961 ("Complaint"). See Declaration of T. Christopher
7 Johns ("Johns Decl."), ¶ 7.

8 2. Mr. Johns, as a named defendant, became aware of the Plaintiff's action on or
9 about July 6, 2012 when he independently obtained a copy of the Complaint. To date, Defendants
10 have not been served a copy of the Complaint and summons by Plaintiffs. Johns Decl., ¶¶ 7, 8.

11 3. Defendants are informed and believe, and thereon allege, that other than the
12 pleadings attached to this notice of removal, there have been no further pleadings, process, or
13 orders filed in this action.

14 4. This Notice of Removal ("Notice") is timely filed pursuant to 28 U.S.C. § 1446(b),
15 which provides that such notice "shall be filed within thirty days after receipt by the defendant,
16 through service or otherwise, of a copy of the initial pleading setting forth the claim upon which
17 such action or proceeding is based." Defendants file this notice of removal within 30 days after
18 receipt of the Complaint. The Complaint was the first paper from which Defendants could
19 ascertain that the action was removable.

20 5. Defendants designated as Does 1 through 30 in the Complaint are merely fictitious
21 defendants who have not been served and whose citizenship shall be disregarded for purposes of
22 this removal. *Fristos v. Reynolds Metal Co.*, 615 F.2d 1209, 1213 (9th Cir. 1980).

23 6. As demonstrated by the following, this action is a civil action over which this Court
24 has original jurisdiction under 28 U.S.C. § 1332, and is one that may be removed to this Court by
25 Defendants pursuant to the provisions of 28 U.S.C. § 1441.

26 //

27 //

DIVERSITY JURISDICTION

A. The Diversity of the Parties

(1) Plaintiffs are not citizens of California. Plaintiffs were at the time of the filing of this action, and still are, citizens of the State of Nevada. Johns Decl., ¶ 4.

(2) Defendants are citizens of California. Defendant THOMAS CHISTOPHER JOHNS was at the time of filing this action, and still is, an individual whose primary residence is in the County of Marin, California. Defendant JOHNS & ALLYN, A.P.C. was at the time of the filing of this action, and still is, a professional corporation under the laws of the State of California, and having its principle places of business in the County of Marin, California. As a consequence Defendants are citizens of the State of California for purposes of this action. 18 U.S.C. § 1332(c)(1).

(3) Defendants designated as Does 1 through 30 in the Complaint are fictitious defendants, are not parties to the action, have not been served and are to be disregarded for the purposes of this removal. 28 U.S.C. § 1441(a).

(4) This Court therefore has original jurisdiction of this action under 28 U.S.C. § 1332 because Defendants are citizens of California and Plaintiffs are citizens of the State of Nevada.

B. The Amount in Controversy

This Court's jurisdictional minimum, an amount in controversy in excess of \$75,000.00, exclusive of interest and costs, was satisfied at the time of the filing of this action, and still is satisfied. In 2008, Plaintiffs entered into a contract with Johns & Allyn, A.P.C in which the Plaintiffs agreed to reimburse Defendants for legal representation. Johns Decl., ¶ 3. Defendants provided legal representation pursuant to the terms of the parties' agreements and Plaintiffs incurred legal expenses in excess of \$300,000 through September 2011. Johns Decl., ¶¶ 5, 6. The nature of the legal representation performed by Johns & Allyn, A.P.C. pertained to the partitioning of property, the value of which was appraised at amounts far in excess of the jurisdictional minimum of \$75,000. Johns Decl., ¶ 6. In the present action, Plaintiffs allege that Defendants

1 breached the contractual agreement in that Defendants allegedly failed to comply with the terms of
2 the agreement and failed to adequately represent Plaintiffs. Johns Decl., ¶ 7.

3 Based on the foregoing, the Court may conclude that the amount in controversy exceeds
4 \$75,000, exclusive of interest and costs. Therefore, Plaintiffs' Complaint satisfies this Court's
5 jurisdictional limit and removal of this matter to the United States District Court for the Northern
6 District of California is proper.

7 CONCLUSION

8 1. Therefore, Defendants file this Notice of Removal of this action from the Superior
9 Court of the State of California in and for the County of Marin, in which it is now pending, to the
10 United States District Court for the Northern District of California.

11 2. A Notice to State Court and to Adverse Party will be filed with the Superior Court
12 of the State of California in and for the County of Marin, and will be served on Plaintiffs.

13 WHEREFORE, Defendants pray that this action be removed from the Superior Court of
14 the State of California in and for the County of Marin to the United States District Court for the
15 Northern District of California.

16
17 Dated: July 25, 2012

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

18
19 By: 

20 Robert C. Gebhardt
21 Andrew M. Smith
22 Attorneys for Defendants
23 THOMAS CHRISTOPHER JOHNS; and
24 JOHNS & ALLYN, A.P.C.
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EXHIBIT A

FILED
JUN 27 2012
KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: T. Fraguero, Deputy

CW 1202961

- By Fax

PLD-C-001

SHORT TITLE:

DeMartini, et al. v. Johns & Allyn, et al.

CASE NUMBER:

4. (Continued)

b. The true names of defendants sued as Does are unknown to plaintiff.

- (1) ☒ Doe defendants (specify Doe numbers): 1-15 were the agents or employees of the named defendants and acted within the scope of that agency or employment.
- (2) ☒ Doe defendants (specify Doe numbers): 16-30 are persons whose capacities are unknown to plaintiff.

c. ☐ Information about additional defendants who are not natural persons is contained in Attachment 4c.d. ☐ Defendants who are joined under Code of Civil Procedure section 382 are (names):5. ☐ Plaintiff is required to comply with a claims statute, and

- a. ☐ has complied with applicable claims statutes, or
- b. ☐ is excused from complying because (specify):

6. ☐ This action is subject to ☐ Civil Code section 1812.10 ☐ Civil Code section 2984.4.

7. This court is the proper court because

- a. ☐ a defendant entered into the contract here.
- b. ☐ a defendant lived here when the contract was entered into.
- c. ☐ a defendant lives here now.
- d. ☒ the contract was to be performed here.
- e. ☒ a defendant is a corporation or unincorporated association and its principal place of business is here.
- f. ☐ real property that is the subject of this action is located here.
- g. ☐ other (specify):

8. The following causes of action are attached and the statements above apply to each (each complaint must have one or more causes of action attached):

- ☒ Breach of Contract
- ☐ Common Counts
- ☒ Other (specify): See attached.

9. ☐ Other allegations:

10. Plaintiff prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and for

- a. ☒ damages of: \$ According to proof
- b. ☒ interest on the damages
- (1) ☒ according to proof
- (2) ☐ at the rate of (specify): _____ percent per year from (date): _____
- c. ☒ attorney's fees
- (1) ☐ of: \$ _____
- (2) ☒ according to proof.
- d. ☐ other (specify):

11. ☐ The paragraphs of this pleading alleged on information and belief are as follows (specify paragraph numbers):

Date: June 27, 2012

Michael DeMartini; Renate DeMartini

(TYPE OR PRINT NAME)

(SIGNATURE OF PLAINTIFF OR ATTORNEY)

(If you wish to verify this pleading, affix a verification.)

PLD-C-001(1)

SHORT TITLE:

DeMartini, et al. v. Johns & Allyn, et al.

CASE NUMBER:

First

(number)

CAUSE OF ACTION—Breach of Contract

ATTACHMENT TO ☒ Complaint ☐ Cross - Complaint
 (Use a separate cause of action form for each cause of action.)

BC-1. Plaintiff (name): Michael DeMartini and Renate DeMartini

alleges that on or about (date): October 24, 2008

a ☒ written ☐ oral ☐ other (specify):

agreement was made between (name parties to agreement):

Michael DeMartini and Renate DeMartini; and Johns & Allyn, A.P.C. and Christopher Johns

☐ A copy of the agreement is attached as Exhibit A, or☒ The essential terms of the agreement ☐ are stated in Attachment BC-1 ☒ are as follows (specify):

Johns & Allyn, A.P.C. and Thomas Christopher Johns agreed to provide legal services and represent Plaintiff relating to Marin County Superior Court Actions: (1) Timothy P. DeMartini, et al, v. Michael DeMartini and Renate DeMartini, et al., No. CIV 085234; and (2) Timothy P. DeMartini, et al. v. Michael DeMartini and Renate DeMartini, No. CIV 085235.

BC-2. On or about (dates):

defendant breached the agreement by ☐ the acts specified in Attachment BC-2 ☒ the following acts (specify):

Johns & Allyn, A.P.C. and Thomas Christopher Johns, failed to represent Plaintiff, failed to comply with the terms of the agreement, breached the fiduciary duty to Plaintiff, and was negligent and, thus expressly and/or impliedly breaching the contract.

BC-3. Plaintiff has performed all obligations to defendant except those obligations plaintiff was prevented or excused from performing.

BC-4. Plaintiff suffered damages legally (proximately) caused by defendant's breach of the agreement

☐ as stated in Attachment BC-4 ☒ as follows (specify):

According to proof

BC-5. ☐ Plaintiff is entitled to attorney fees by an agreement or a statute☐ of \$☒ according to proof.BC-6. ☐ Other:

Page 3

Page 1 of 1

SHORT TITLE:

DeMartini, et al. v. Johns & Allyn, et al.

Second CAUSE OF ACTION – NEGLIGENCE

ATTACHMENT TO: Complaint

Plaintiff: Michael DeMartini and Renate DeMartini

alleges that on or about October 23, 2008 – September 30, 2011, Defendant was negligent with regards to Plaintiff and that Plaintiff suffered damages according to proof and that Plaintiff is entitled to attorney fees by an agreement or a statute according to proof.

SHORT TITLE:

DeMartini, et al. v. Johns & Allyn, et al.

Third CAUSE OF ACTION – BREACH OF FIDUCIARY DUTY

ATTACHMENT TO: Complaint

Plaintiff: Michael DeMartini and Renate DeMartini

alleges that on or about October 23, 2008 – September 30, 2011, Defendant breached a fiduciary duty to Plaintiff and that Plaintiff suffered damages according to proof and that Plaintiff is entitled to attorney fees by an agreement or a statute according to proof.

CERTIFICATE OF SERVICE*Michael DeMartini, et al. v. Thomas Christopher Johns, et al.*

At the time of service I was over 18 years of age and not a party to this action. I am employed by WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP. My business address is 525 Market Street, 17th Floor, San Francisco, California 94105. My business telephone number is (415) 433-0990; my business fax number is (415) 434-1370. On this date I served the following document(s):

**NOTICE OF REMOVAL OF CIVIL ACTION UNDER 28 U.S.C. §1441
PURSUANT TO 28 U.S.C. § 1332; DECLARATION OF T. CHRISTOPHER
JOHNS IN SUPPORT OF NOTICE OF REMOVAL OF CIVIL ACTION
UNDER 28 U.S.C. §1441 PURSUANT TO 28 U.S.C. § 1332; and CIVIL
COVER SHEET**

on the person or persons listed below, through their respective attorneys of record in this action, by placing true copies thereof in sealed envelopes or packages addressed as shown below by the following means of service:

☒: **By United States Mail.** I placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

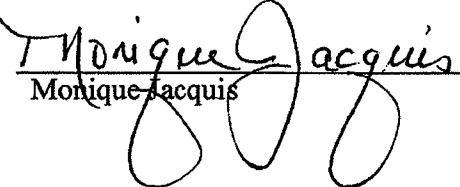
☐: **By Fax Transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used.

☐: **By Electronic Service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below.

Michael DeMartini
3362 Meridian Court
Reno, NV 89509
Attorney for Plaintiffs

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

EXECUTED on July 26, 2012 at San Francisco, California.


Monique Jacquie

PROOF OF SERVICE